No. 12,390.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KAUFMAN-BROWN POTATO COMPANY, a Partnership composed of Charles H. Kaufman and Albert H. Brown, Charles H. Kaufman and Albert H. Brown,

Appellants,

vs.

WAYNE LONG, as Trustee in Bankruptcy of the Estates of Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a Co-partnership; Gerry Horton and J. D. Althouse, doing business as Gerry Horton Farms, a Co-partnership; Gerry Horton, an individual, and J. D. Althouse, an individual,

Appellees.

REPLY BRIEF FOR APPELLANTS.

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Appellees.

REPLY BRIEF FOR APPELLANTS.

Counsel for appellees say, page 2 of their brief:

> "Therefore the only appellee is Wayne Long as trustee in bankruptcy of the estate of Gerry Horton Farms, a copartnership composed of Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed only of Gerry Horton and J. D. Althouse."

These proceedings were initiated by Wayne Long as Trustee of the Bankrupts [Tr. pp. 14, 22] named in the heading and caption of appeals. We think such caption is, therefore, correct.

I.

The Proceedings in the Bankruptcy Case Did Not Justify the Court in Entering an Order Adjudicating Gerry Horton Farms, an Alleged Copartnership Engaged in the Raising of Potatoes, a Bankrupt.

In our opening brief we contended that assuming, without conceding, a partnership existed known as Gerry Horton Farms composed of Gerry Horton Farms and Kaufman-Brown Potato Company, the most the Court could have done would be to direct the administration of the property of said alleged partnership on the theory that the acts of the Kaufman-Brown Potato Company were such that its consent to the administration of assets in the bankruptcy proceeding might be implied and that in going further and adjudicating such alleged partnership a bankrupt, the Court exceeded the proprieties and its power. We do no think that the argument of appellants in their brief has weakened that contention.

It appears that the appellees contend that Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, was not adjudicated a bankrupt on the involuntary petition, but that Gerry Horton Farms, a copartnership composed of Kaufman-Brown Potato Company and Gerry Horton Farms, was the Gerry Horton Farms which was adjudicated a bankrupt on the original petition in bankruptcy. They say we were in error when we said in our brief:

> "In its order and findings the Court was particularly careful, however, not to decree or find that Kaufman-Brown Potato Company was a partner of

> Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, the adjudicated partnership, but did decree and find that it was a partner with Gerry Horton Farms in a separate partnership known as Gerry Horton Farms engaged in the growing of potatoes, and adjudicated such partnership to be bankrupt as a distinct partnership, separate and apart from Gerry Horton Farms originally adjudicated a partnership."

The record speaks for itself on this point.

It is admitted that there was a partnership known as Gerry Horton Farms, composed of Gerry Horton and J. D. Althouse. The involuntary petition in bankruptcy was directed against Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse. Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, was adjudicated a bankrupt by the original order of adjudication. In the findings of fact and conclusions of law, being Exhibit "A" attached to the order affirming the order of adjudication, we find the following [Tr. p. 77]:

> ". . . that the order of adjudication should be corrected, amended and modified by adding thereto in addition to those adjudged bankrupts, 'Gerry Horton Farms, a partnership composed of Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse.'"

In Exhibit "B" attached to the order affirming order of referee re adjudication, which exhibit is the amendment and modification of the original order of adjudication, we find the following language [Tr. pp. 77, 78, 79]:

> "1. That the order of adjudication of bankruptcy dated August 15, 1944, signed by Waldo R. Bergman, Referee in Bankruptcy, be and it is hereby amended and modified by changing the first paragraph of said order to read as follows:
>
> 'At Bakersfield, in the Southern District of California, on the 15th day of August, 1944, before Honorable Waldo R. Bergman, Referee in Bankruptcy, the petition of Kaufman-Brown Potato Company, a copartnership, Earl Cecil and J. Deacy Brown, doing business as Rosedale Warehouse Company, a copartnership, and John Lewis praying that Gerry Horton Company and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, and Gerry Horton and J. D. Althouse, individually, be adjudicated bankrupts within the true intent and meaning of the Act of Congress relating to bankruptcy, having been heard and duly considered; and it appearing that Gerry Horton Company is a partnership composed of J. D. Althouse and Gerry Horton; that Gerry Horton Farms, a copartnership, not engaged in the raising of potatoes, is composed of Gerry Horton and J. D. Althouse; that Gerry Horton Farms, a partnership engaged in the raising of potatoes, is composed of Kaufman-Brown Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse; and that said partnerships of Gerry Horton Company, Gerry Horton Farms, not engaged in the raising of potatoes, and

Gerry Horton Farms, a partnership engaged in the raising of potatoes, and Gerry Horton, an individual, and J. D. Althouse, an individual, are all insolvent and that Kaufman-Brown Potato Company, a copartnership, one of the general partners of Gerry Horton Farms, the partnership engaged in the raising of potatoes, consented to the adjudication in bankruptcy and administration of the estate of Gerry Horton Farms, a partnership.'

"2. That Gerry Horton Company, a copartnership composed of Gerry Horton and J. D. Althouse; Gerry Horton Farms, the partnership not engaged in the raising of potatoes composed of Gerry Horton and J. D. Althouse; Gerry Horton Farms, a partnership engaged in the raising of potatoes composed of Kaufman-Brown Potato Company, a copartnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership consisting of Gerry Horton and J. D. Althouse; Gerry Horton, an individual; and J. D. Althouse, an individual, is each a bankrupt under the Act of Congress relating to bankruptcy and each is hereby declared and adjudged a bankrupt accordingly."

It is apparent, therefore, from a reading of the above, that counsel for appellees are in error when they say that Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, was not adjudicated a bankrupt on the involuntary petition, and it is further apparent that in addition to the parties already adjudicated bankrupt an additional alleged copartnership, composed of Gerry Horton Farms, the already adjudicated partnership, and Kaufman-Brown Potato Company, was adjudicated a bankrupt.

The proceedings in the case did not justify the order of adjudication as to said alleged partnership for the reason set forth in our opening brief.

Counsel for appellees in their brief, page 37, have cited *In re Fuller,* 9 F. 2d 553, as authority, holding that the joining of a non-bankrupt partner with a firm creditor in a petition asking that the former firm assets be applied first on firm debts, was a consent to an adjudication in bankruptcy. A reading of the case will show that the holding of the Court was that the consent was no more than that the property should be administered in the bankruptcy proceeding and that it did not hold that the consent was to an adjudication in bankruptcy.

II.

Kaufman-Brown Potato Company Was Not a Partner in Gerry Horton Farms.

In our opening brief we pointed out that in the relationship between Kaufman-Brown Potato Company and Gerry Horton Farms there could be no partnership in that there was no purpose of jointly carrying on a partnership business. Counsel for appellees attempt to supply this element of a partnership by urging that while Gerry Horton Farms, composed of Gerry Horton and J. D. Althouse, were to do the growing of the potatoes, Kaufman-Brown Potato Company was to do the selling. They overlook, however, that any selling on the part of Kaufman-Brown Potato Company was not a selling on behalf of any partnership in which they were a member. It is expressly provided in the agreements that Kaufman-Brown Potato Company might have the first right to purchase the potatoes, in which case they sold on their own account,

and, as to potatoes not purchased by them, Kaufman-Brown Potato Company agreed to handle said potatoes as agents for first parties. Gerry Horton and J. D. Althouse, copartners doing business under the firm name and style of Gerry Horton Farms, were the first parties under said agreements.

The appellees in their brief quote certain language to the effect that Mr. Kendall, then attorney for the Kaufman-Brown Potato Company, admitted a partnership. In that the whole context shows that opposition was being made on that point, and the fact that this supposed admission came at a point where the Court was endeavoring to marshal claims so that, if it were thereafter adjudicated that Kaufman-Brown Potato Company was a member of the partnership, such marshaling would be effective, we think the language used by Mr. Kendall must have been used to distinguish one alleged partnership from the other alleged partnership in the prayer placement of claims. Furthermore, at Transcript, page 197, Mr. Kendall makes this unequivocable statement: "To make the issue clear: we admit it is a straight financing deal, and they are not partners." In fact Mr. Kendall as an attorney, on behalf of his clients could properly go no further than this statement.

The conversation of the parties prior to the making of the agreements, the agreements themselves, and the acts and conduct of the parties, distinctly show that a financing arrangement was intended and not a partnership. Furthermore, there appears to have been no holding out to creditors or to any one that Kaufman-Brown Potato Company was a member of Gerry Horton Farms. It would appear that the first thought that a partnership relationship existed between Gerry Horton Farms and Kaufman-

Brown Potato Company occurred during the course of the bankruptcy proceedings.

In the financing arrangement the profits to be gained by Kaufman-Brown Potato Company for the advancement of funds was the right to purchase potatoes and to obtain a percentage of expected profits. In the event it did not purchase the potatoes it had the right to sell same on a commission basis, and this consideration was an item to be considered in connection with profits. In that counsel for Gerry Horton Farms, first party to the agreements, prepared the agreements, if there are ambiguities in the same such ambiguities must be construed more strongly against Gerry Horton Farms.

The evidence plainly does not sustain the findings of the Court in respect to a partnership. The Court finds [Tr. p. 72]:

> ". . . each of the parties had the right and could make contracts and incur liabilities on behalf of said partnership and manage and control the business, and jointly carry on the business of said partnership; and said parties did jointly participate in the management and control of the business of said partnership."

The evidence does not sustain this finding [Testimony of Gerry Horton, Tr. pp. 271, 272]:

> "Q. Did they hire any of your help? A. Beg your pardon?
>
> Q. Did they hire any of your help? A. No.
>
> Q. Did they fire any of your help? A. No.
>
> Q. Did they buy any material for your operations, any of the supplies? A. You mean did they sign the order for that, or did they pay for them?

Q. Did they buy any of it for the operation, themselves? A. No. I bought all the materials used in the operations.

Q. You were the manager all the way through, all through this deal, were you not? A. That is correct.

Q. Did they interfere any way whatever in your management of these operations? A. No.

Q. Did they have any right to sign checks on the bank account of the operation on the potato deal? A. No."

In our opening brief we confined our citations to cases setting forth controlling elements that must govern the determination as to whether a relationship was or was not a partnership. We did not elaborate on factual situations for, as was said in *Associated Piping etc. Co., Ltd. v. Jones* (17 Cal. App. 2d 107, at page 111):

> "Each case, therefore, is adjudicated upon its own facts, and very little value will be found from any extended review of the authorities. That is precisely the case at bar, the question being as to whether appellant permitted himself to be represented as a partner and the reliance by third parties upon such representation."

However, we do submit that the case of *Martin v. Sharp & Fellows Contracting Co.,* 34 Cal. App. 584, mentioned in our opening brief at page 21, comes more nearly fitting the facts of the instant case than any of the cases cited by appellees.

The cases cited by counsel for the appellees in their brief are not of particular aid in arriving at the determination of the issues in this case. Appellees cite *Kersh v. Taber,* 67 Cal. App. 2d 499, at page 504, and, immedi-

ately following the excerpt quoted by counsel, we find the following:

> "A partnership is an association of two or more persons to carry on as co-owners a business for profit. (Civ. Code, Par. 2400.) Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in profits and losses and in the management and control of the business. (*Black v. Brundige,* 125 Cal. App. 641 (13 P. 2d 999); *Smith v. Grove,* 47 Cal. App. 2d 456 (118 P. 2d 324); *Martin v. Sharp & Fellows Cont. Co.,* 34 Cal. App. 584 (168 P. 373); 20 Cal. Jur. 689, Par. 9.) The plaintiff in this case had no participation nor right to share in the management of the mining operations or the proceeds therefrom until after title to the mine had been procured."

At page 505, we find the following:

> "The main reliance of the plaintiffs is on the provision of the contract that the defendants were to share in a division of the profits. But this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, and the proposed profit sharing was contemplated only as compensation or interest for the use of the money advanced."

In *Lusher v. Silver,* 70 Cal. App. 2d 586, at page 588 in addition to the excerpt cited by counsel for the appellees, we find the following:

> "On appeal defendant contends that the language testified to by plaintiff 'why not go together and buy ourselves properties and split the profits on them' is insufficient to establish a partnership as to the properties which the court found they bought and sold as partners.

> "In the last analysis the *fact* of partnership depends upon the intention of the parties. To determine this intent not only the words of the agreement itself, but the actions and conduct of the parties may be considered. All the evidence should be taken into account to support the finding. (*Associated Piping and Engineering Co. v. Jones,* 17 Cal. App. 2d 107 (61 P. 2d 536.)"

In *Associated Piping etc. Co. v. Jones,* 17 Cal. App. 2d, page 107, cited by counsel for appellees on pages 23 and 24 of their brief, we find, at page 111, the following:

> "As between the parties themselves, when the rights of no third persons are involved, the question is one of determination merely upon the letter of the contract and the conduct of the contracting parties to each other under it. When, however, the rights of third parties are involved, the basis of the inquiry shifts materially, and the fundamental question is: What had those parties the right to believe from the language of the contract and from the conduct of the parties to it as affecting them, and not as affecting each other?"

and the court held that there was ample evidence to show that the appellant permitted himself to be represented as a partner and that third parties relied upon said representation.

In *Lyon v. MacQuarrie,* 46 Cal. App. 2d 119, cited by counsel for appellees in their brief on page 25, we find the following excerpt of testimony at page 122:

> "Q. Did you discuss with him at that time on what basis the partnership would be? A. We said we have always been together and whatever was yours was mine and vice versa. And 'Whatever I

> make in this, fifty per cent is yours.' I said, 'Isn't this a coincidence, because that steel deal I was telling you about—the hardening of steel out of a product called tetralloy that I have had.' I said, 'It is just a coincidence. I am going to make some money on that.' And I said, 'You are in fifty per cent on that deal with me, just like I am fifty per cent on this radio act with you.' He said, 'O. K.; that is O. K. by me; shake. We are partners.' "

On conflicting evidence the court held a partnership existed.

Thompson v. O. W. Childs Estate Co., 90 Cal. App. 552, cited by counsel for the appellees on page 25 of their brief, differs from our case in that no question of a financing arrangement appeared in the case.

Other cases cited by counsel for appellees turn upon the question of conflicting evidence and, in certain instances, upon the conduct and the dealing with the world of the parties asserted to be partners.

On page 21 of our opening brief we cited *Martin v. Sharp & Fellows Contracting Co.,* 34 Cal. App. 584, at page 588, as authority that there must be a purpose of jointly carrying on the business before there can be said to be a partnership. There are numerous authorities to this effect. In one of those cases, *O. Krenze C. & B. Works, Inc. v. England,* 109 Cal. App. 747, the excerpt quoted by us is quoted in the case and likewise it is there said, at page 751:

> "The testimony also shows that all the manufacturing, buying and selling was done by Moss; that defendant took no part in arranging for the location of the business or the leasing of the premises where

the same was conducted; that Moss purchased the office equipment and engaged and directed the employees; that defendant was not authorized to draw checks upon the bank account of the concern and had no access to the books; further, that he exercised no supervision over the business or gave Moss instructions respecting its management, nor did the agreement give him the right to do any of these things. It was testified by defendant that he did not intend to form a partnership, and by Moss that he was conducting the business under the described contract."

The Court held that no partnership existed.

Conclusion.

We respectfuly submit, as we did in our opening brief, that from the facts and the law the three orders involved in this consolidated appeal should be reversed.

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